United States Court of Appeals

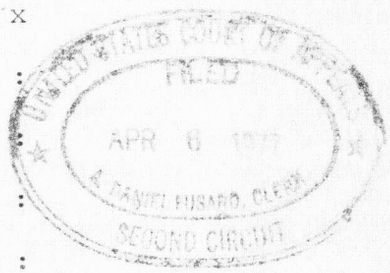
for the Second Circuit

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

77-7105

OSCAR ROBERTSON, et al.,	DOCKET NO. 77-7105
Plaintiffs,	
- against -	
NATIONAL BASKETBALL ASSOCIATION, et al.,	
Defendants.	
AMERICAN BASKETBALL ASSOCIATION, et al.,	
Cross-Claimants,	
- against -	
NATIONAL BASKETBALL ASSOCIATION, et al.,	
Cross-Defendants.	
R. T. ECKLES, Trustee in Bankruptcy for Mountain States Sports, Inc., d/b/a Utah Stars,	
Cross-Claimant-Appellant,	
- against -	
FREDERICK P. FURTH,	
Appellee.	



On Appeal From The United States District Court
For The Southern District Of New York

BRIEF FOR FREDERICK P. FURTH

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

OSCAR ROBERTSON, et al.,	:	DOCKET NO. 77-7105
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AMERICAN BASKETBALL ASSOCIATION, et al.,	:	
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- against -	:	
NATIONAL BASKETBALL ASSOCIATION, et al.,	:	
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R. T. ECKLES, Trustee in Bankruptcy for Mountain States Sports, Inc., d/b/a Utah Stars,	:	
Cross-Claimant-Appellant,	:	
- against -	:	
FREDERICK P. FURTH,	:	
Appellee.	:	

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UNITED STATES COURT OF APPEALS

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- x

OSCAR ROBERTSON, et al., :

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- against - :

NATIONAL BASKETBALL ASSOCIATION, et al., :

Defendants. :

- x

AMERICAN BASKETBALL ASSOCIATION, et al., :

Cross-Claimants, :

- against - :

NATIONAL BASKETBALL ASSOCIATION, et al., :

Cross-Defendants. :

- x

R. T. ECKLES, Trustee in Bankruptcy for Mountain States Sports, Inc., d/b/a Utah Stars, :

Cross-Claimant-Appellant, :

- against - :

FREDERICK P. FURTH, :

Appellee. :

- x

On Appeal From The United States District Court
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BRIEF FOR FREDERICK P. FURTH

* *

* *

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I. PRELIMINARY STATEMENT.

This is an appeal by Cross-Claimant-Appellant, R. T. Eckles, Trustee in Bankruptcy for Mountain States Sports, Inc., d/b/a Utah Stars (hereinafter "Utah Stars") from an Order of the Honorable Robert L. Carter of the United States District Court for the Southern District of New York, dated and entered on February 24, 1977 (A164)[1] granting the application of Furth, Fahrner & Wong (formerly Law Offices of Frederick P. Furth) and Frederick P. Furth (hereinafter collectively "Furth") to withdraw as counsel for the Utah Stars with respect to its cross-claim against the National Basketball Association and its member teams (hereinafter "NBA") for violations of the antitrust laws.

Furth is before this Court in an unusual circumstance. Certain of his former clients have each retained separate counsel and appear before this Court in adversary roles. Mr. Heyman is prosecuting this appeal on behalf of one of Furth's former clients, Utah Stars, while Mr. Carlson has been granted leave to intervene on behalf of certain other of Furth's former clients, to wit: Indiana Pacers, Denver Nuggets, San Antonio Spurs and New York Nets, and has this date filed a brief in opposition to the views urged by Utah Stars.

In view of the conflicting position taken by these clients, both in this Court and below, we cannot elect one side over the other. Accordingly, this brief will simply attempt to direct this Court's attention to the

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[1] Refers to pages of Appendix for Cross-Claimant-Appellant Utah Stars.

record developed below and set forth the applicable legal principles which District Courts sitting in San Francisco (Zirpoli, J.) and below (Carter, J.) have concluded mandate that Furth be relieved as counsel to all American Basketball Association cross-claimants.

II. ISSUE PRESENTED FOR REVIEW.

Whether the District Court erred in granting the Petition of counsel for Leave to Withdraw where the discharge of duty to one Client conflicted with the duty to another.

III. STATEMENT OF CASE.

The facts herein are undisputed. In January, 1974, Furth was retained by the Commissioner of the American Basketball Association (herein "ABA") and its Board of Trustees to institute certain litigation against the National Basketball Association cross-defendants below. A5.

On January 30, 1974, Furth filed, on behalf of the American Basketball Association and its then member teams, an action in the United States District Court for Northern California seeking damages for violations of the antitrust laws, breach of contract and fraud against the National Basketball Association and its then member teams. Said action was styled American Basketball Association, et al., v. National Basketball Association, et al., No. C-74-0235 RFP. A6. In September, 1974, pursuant to stipulation, Furth filed the cross-claims asserted in the Court below by the American Basketball Association cross-claimants, on behalf of all those entities other than

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Long Island Sports (New York Nets). Those ABA cross-claims were filed on behalf of the following entities:

AMERICAN BASKETBALL ASSOCIATION PARTY CROSS-CLAIMANT

American Basketball Association	
Denver Rockets Basketball, Ltd.	(Denver Rockets)
Indiana Professional Sports, Inc.	(Indiana Pacers)
Mountain States Sports, Inc.	(Utah Stars)
The Munchak Corp.[2]	(Carolina Cougars[3])
Professional Sports, Ltd.	(San Antonio Spurs)
San Diego Professional Basketball Corporation	(San Diego Conquistadors)
New Virginia Squires	(Virginia Squires)

Thereafter, the District Court granted motions of additional parties to be joined as ABA party cross-claimants. These party cross-claimants were:

Additional Party Cross-Claimant	
Denver Nuggets Basketball, Ltd.[4]	(Denver Nuggets)
Arena Sports, Inc.	(Indiana Pacers)
Triangle Sports, Inc.	(Memphis Sounds)

The District Court subsequently ordered the substitution of R. T. Eckles, Trustee in Bankruptcy for Mountain States

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[2] Subsequently Spirits of St. Louis, LP.

[3] Subsequently Spirits of St. Louis.

[4] Denver Nuggets Basketball, Ltd., has represented below that it had succeeded to the cause of action asserted by Denver Rockets Basketball, Ltd.; Arena Sports, Inc. had represented below that it has succeeded to the cause of action asserted by Indiana Professional Sports, Inc. Furth took no position with respect to these issues.

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Sports, Inc., appellee herein, in place of Mountain States Sports, Inc. A6-7.

In June, 1976, the Commissioner of the American Basketball Association and its Board of Trustees, consisting of the then present owners of the American Basketball Association franchises for the Indiana Pacers (Arena Sports, Inc.) New York (Long Island Sports, formerly Long Island Sports Enterprises, Inc.) San Antonio (Professional Sports, Ltd.) Denver (Denver Nuggets Basketball, Ltd.), St. Louis (Spirits of St. Louis, L.P., formerly Munchak Corporation), and Kentucky (a non-party), as well as the American Basketball Association itself, informed Furth that they had reached an agreement in principle to compromise and settle the outstanding litigation below against the NBA cross-defendants. A7. At a pre-trial conference on June 18, 1976, Furth so informed the District Court, and further noted to the Court at that time that the agreement in principal to compromise had been consummated by only certain of the American Basketball Association parties below, to wit: ABA, Indiana, New York, San Antonio, Denver, and St. Louis, and that certain others had reached no such settlement. A7-8.

As Utah Stars conceeds, Furth did not participate in the negotiations leading to the aforesaid June, 1976 agreement in principal to compromise the litigation below. A8. However, Furth was informed below that said compromise included, inter alia, an agreement that four of the American Basketball Association cross-claimants below, to wit: Denver Nuggets Basketball, Ltd. (Denver); Arena Sports, Inc.

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(Indiana); Professional Sports, Ltd. (San Antonio) and Long Island Sports (New York), would become members of the cross-defendant National Basketball Association, commencing with the 1976-77 basketball playing season. Furth was further informed that these entities had agreed to indemnify the National Basketball Association cross-defendants for any judgment which might be entered as a result of American Basketball Association entity claims prosecuted below against the NBA cross-defendants. Counsel additionally informed Furth that Denver, Indiana, San Antonio and New York, by virtue of the National Basketball Association's joint venture agreement, would be responsible for a proportionate share of the damages recovered by any American Basketball Association entity as a result of the prosecution of American Basketball Association cross-claimants' claims below. A8.

Subsequent to their aforesaid settlements, American Basketball Association, Denver, San Antonio, Indiana and St. Louis instructed Furth to file with prejudice dismissals of their cross-claims in the District Court, and Furth did so. Further, New York instructed its counsel, Mr. Carlson, to file with prejudice dismissal of its cross-claims, and Mr. Carlson so complied.[5]

The following "non-settling" entities remained American Basketball Association cross-claimants: Utah Stars; New Virginia Squires; Indiana Professional Sports, Inc., (predecessor to dismissing cross-claimant Arena Sports, Inc.); Denver Rockets Basketball, Ltd. (predecessor to dismissing

---

[5] Kentucky, the remaining American Basketball Association "settling" entity, was not a party to the litigation below.

cross-claimant Denver Nuggets Basketball, Ltd.); Triangle Sports, Inc. and San Diego Professional Basketball Corporation. A8-9.

Certain of the non-settling ABA cross-claimants, including Utah Starts, expressed their view that the compromise and settlement by certain of Furth's clients was itself part of an anti-competitive scheme involving these clients, the NBA cross-defendants and certain third-parties. Indeed one of Furth's clients, New Virginia, filed an action against certain of Furth's other clients in the United States District Court in Norfolk, Virginia.[6] A10.

As a result of the aforesaid compromise and settlement of certain of Furth's clients below and subsequent events relating thereto, Furth concluded that a conflict had developed vis-a-vis his continued representation of the remaining cross-claimants below.

On September 8, 1976, Peter Flournoy, Esq., representing San Diego Professional Basketball Corporation, appeared before the District Court, urging that Judge Carter hold Furth responsible for the continuing prosecution of the American Basketball Association cross-claim against the National Basketball Association cross-defendants. The Court responded to Mr. Flournoy as follows:

> "THE COURT: What you are telling me, what the reality is, if the ABA and these other clubs settle and Mr. Furth is counsel, the probability is that he would not be able,

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[6] On March 7, 1977, Judge Carter enjoined Virginia from prosecuting their action in Norfolk, concluding that it could fully protect its rights in Judge Carter's Court. 1977-1 T.C. ¶ 61,324.

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having represented the ABA which has now settled, he probably would not be in a position to represent any contending club under any circumstances, not in this court. If he were to attempt to represent I think there would be a motion made in regard to the conflict of interest so that problem is put aside, but it appears to me that your action, if you want to maintain it and pursue it, remains. (Emphasis added.)

* * *

"THE COURT: I think it would be very difficult in my judgment for Mr. Furth, having represented the ABA and the ABA having settled this litigation and being a party to the settlement and approving the settlement and so forth, I think Mr. Furth would be in a very difficult position without the indemnification to pursue this litigation on behalf of any member team. I tnink he would be.

* * *

"THE COURT: I am saying to you that Mr. Furth having represented the ABA, which is the overall entity that has settled and wants out of the litigation, that without the indemnification I think Mr. Furth would have a difficult position to attempt to represent you and to continue this lawsuit.

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"MR. FLOURNOY: I really believe that's incorrect, but I don't have the cases to point that out to you.

"THE COURT: In any event --

"MR. FLOURNOY: It's been my general experience, your Honor, sure some people can settle out, but the person charged with the litigation containues on for those plaintiffs who want to continue to litigate.

"THE COURT: The point is that the party that settled out, the main party that he represents is the ABA and he is representing these member clubs because they are a part of the ABA, but in any event let me just put it this way: I don't see any way, Mr. Flournoy, that I can find on the basis of our argument that I can indicate that this indemnification agreement is something that I would bar. I don't see how I can do that. There is no basis for me to do that. A10-11.

On November 22, 1976, the very issues presented in the Application for Withdrawal filed below had come before United States District Court for the Northern District of California in Civil No. 51055, American Basketball Association, et al. v. National Basketball Association, et al., (Zirpoli, J.), upon the oral motion of Furth, Fahrner & Wong to be relieved as counsel therein. That action had been filed in 1969 by Furth on behalf of the American Basketball Association and

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their then existing teams against the National Basketball Association and its then existing teams. Said action remained pending as to certain of the original parties through 1976, although prosecution had been stayed by Court below after the American Basketball Association cross-claims were filed in September, 1974. A12.

In ordering that Furth be relieved as counsel, Judge Zirpoli stated in open court:

> "THE COURT: Well, I am satisfied that there is such a conflict here that it would be entirely improper for me to continue Mr. Furth as counsel for the plaintiffs. He represented the ABA and the named plaintiffs at the request and direction of the Trustees of ABA. Is that what you call them? And the Commissioner. And having been delegated to exercise this responsibility, he did so, I assume, at the time without for one moment believing that this type of conflict would arise. So that we would have to say that his representation at that time of all plaintiffs, the ABA and the Commissioner and the trustees, was a good-faith representation.
>
> "It subsequently developed that this litigation is in a sense settled by reason of that settlement, except for certain parties who now make claims, on the theory that they are not bound thereby, or that the terms and conditions are

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such that the agreement is a nullity. There are others who have dismissed, a substantial number of them. And now Mr. Furth finds himself in a very definite conflict. He cannot have representative people (sic) who dismissed and who are anxious to have all of this litigation terminated themselves, and at the same time represent the people who don't want it terminated." (Emphasis added).[7] A12-13.

IV. IT IS UNDISPUTED THAT FURTH'S CLIENTS NOW HAVE ANTAGONISTIC AND CONFLICTING INTERESTS.

Furth's Petition to Withdraw below (as well as that filed in the action before Judge Zirpoli) was predicated upon the undisputed fact that certain of Furth's clients had, due to events over which he had no control, assumed hostile positions against each other. The settling ABA cross-claimants below accordingly instructed Furth to cease prosecution of that action because otherwise, he would be in effect prosecuting the litigation against the interests of certain of his own clients.

Utah's brief ignores this basic fact. For instance, Utah asserts "In his continued representation of the Utah Stars, Mr. Furth continues to maintain the same position vis-a-vis the NBA that he maintained on behalf of

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[7] Furth's affidavit filed in the District Court details the events concerning the creation of the conflict. A5 et seq. Utah Stars did not dispute them below, nor do so here.

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the ABA and its member teams at the time (January, 1974) he executed his employment agreement ... ." Brief at 9. However, as the undisputed record below reveals, this is simply untrue. Four of former ABA teams, i.e., original ABA cross-claimants (Denver, New York, Indiana and San Antonio), are now NBA members, and as such, subject to, inter alia, the terms of the NBA's Joint Venture Agreement. See Furth Affidavit, A8; Robert S. Carlson Affidavit, A15-18; A117. This is a point not addressed by Utah's Brief. As such, this situation is entirely distinguishable from that presented in Formal Opinion No. 165, cited by Utah's Brief. The cross-claim below does of course, seek affirmative relief against the NBA and, as such, against the settling ABA parties.

V. APPLICABLE AUTHORITY REQUIRED MR. FURTH'S WITHDRAWAL AS COUNSEL.

Indeed, the situation here can best be described by Canon 6, Code of Professional Responsibilities, cited by the Trustee's Brief at page 11, i.e., "compromising influences and loyalties" permeate Mr. Furth's situation.[8] Indeed, this is the precise basis upon which Judge Zirpoli entered his

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[8] For example, as noted in the Furth Affidavit filed below, nonsettling Virginia has commenced an action against the settling ABA teams, alleging improprieties in the settlement. See A19 et seq.

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Order relieving Mr. Furth as counsel. See Order dated December 23, 1976 (herein Judge Zirpoli's Order), A99-101.[9]

Rule 5-102(B), Rules of Professional Conduct of the State Bar of California, codified at § 6076 Cal. Business and Professions Code (1976 Supp.), states:

> "A member of the State Bar shall not represent conflicting interests except with the consent of all parties concerned." (emphasis added).

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[9] Judge Zirpoli, upon the same issues and facts as presented to Judge Carter, made the following findings in granting Furth's Petition to Withdraw:

> - Frederick P. Furth and Furth, Fahrner & Wong (successor to Law Offices of Frederick P. Furth) and William C. Barnard and Sommer, Tinkham, Barnard & Freiberger were originally retained as counsel for plaintiffs by the Commissioner of the American Basketball Association, and its Board of Trustees;
>
> - Certain member teams of the American Basketball Association, including certain successors in interest of certain plaintiffs have reached an agreement to compromise and settle this matter with certain defendants and certain of their successor in interest;
>
> - As a result of the aforesaid compromise and settlement by certain plaintiffs and certain of their successors in interest, a conflict has developed vis a vis the continued representation of plaintiffs by Frederick P. Furth and Furth, Fahrner & Wong and William C. Barnard and Sommer, Tinkham, Barnard & Freiberger;
>
> - The interests of justice, therefore, require that the Court relieve Furth, Fahrner & Wong, Frederick P. Furth and Daniel S. Mason and Sommer, Tinkham, Barnard & Freiberger and William C. Barnard as counsel of record to all plaintiffs.

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The California case law has concurred. As noted in Ishmail v. Millington, 241 C.A.2d 520, 527 (fn.) (1966)),

> ". . . California courts have repeatedly held that counsel should terminate a relationship when the discharge of duty to one client conflicts with duty to another. Detramanti v. Lompoc Unified School Dist., 143 Cal. App. 2d 715. 723; Hammett v. McIntyre, 114 Cal. App. 2d 148, 153-154; McClure v. Donovan, 82 Cal. App. 2d 664, 666; Pennix v. Winton, 61 Cal. App. 2d 671, 773."

Indeed, the Supreme Court of California has ruled that "[an attorney] may not do anything which will injuriously affect his former client in any matter in which he formerly represented him ...." Wutchumna Water Co. v. Barley, 216 Cal. 569, 573-579.

And another Court has similarly noted:

> "It is the general and well-stated rule that an attorney [cannot] assume a position hostile to his clients, and one inimical to the very interests he was engaged to protect; and it makes no difference, in this respect, whether the relation itself has been terminated, for the obligation of fidelity and loyalty still continues ...." In Re Boone, 83 Fed. 944, 952 (N.D. Cal. 1894). See also, Sheffield v. State Bar, 22 C.2d 627, 631 (1943).

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The federal case law is in total accord. The Court of Appeals for the District of Columbia has observed that "[t]he law is well settled that an attorney, having acted as such for a client, cannot thereafter assume a hostile position to him about the same manner ...." Brown v. Miller, 286 F. 994, 997 (D.C. Cir.). Similarly, the Court in Porter v. Huber, 68 F.Supp. 132, 135 (W.D. Wash. 1946), has ruled that "[i]t is both the right and duty of the Court to prohibit or restrain an attorney from acting for one whose interest is adverse to that of a former client."

Utah's Brief infers that the only test with respect to whether an attorney is representing conflicting interests involves a determination as to whether the representation involves disclosure of confidential communications.[10] See Utah's Brief at 20 et seq and discussion of California law. However, as Drinker notes in his text, Legal Ethics, 109 (Columbia University 1953) "such, however, is not the sole test." Indeed, Cannon 6, Code of Professional Responsibility, states "two distinct obligations." "First, not to represent conflicting interests except with the deliberate consent of all concerned. Second, not to disclose or abuse professional confidence." Id.

* *

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[10] Utah's argument that Furth breaches the employment agreement by seeking to withdraw under these facts is without merit. The efforts expanded by Furth on behalf of all cross-claimants is subject to no dispute by any of the parties. Utah's brief is notable in that it fails to indicate the financial contribution it made to that effort.

Utah's suggestion that Mr. Furth "would be permitted to represent one of the ABA teams against the others ..." in California, Memorandum 13, is belied by the fact that Judge Zirpoli has already found, in the San Francisco action, that "the interests of justice" require Mr. Furth be relieved. See Judge Zirpoli's Order, supra.

VI. CONCLUSION.

Furth's Petition to withdraw was filed in the Court below based upon the good faith conviction that his clients had assume wholly antagonistic positions vis-a-vis each other. Directions from one set of clients were contradicted by directions from others. In such circumstances, Furth undertook to do what two United States District Courts have indicated to have been the only course of conduct available to him, to wit: petitioning for leave to withdraw.

DATED: April 5 , 1977
San Francisco, California.

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